

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION

DARYL ANTHONY BABB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:07-CV-161-RWS
	)	
CAPE GIRARDEAU COUNTY JAIL,	)	
et al.,	)	
	)	
Defendants.	)	

**ORDER AND MEMORANDUM**

This matter is before the Court upon the application of Daryl Anthony Babb (registration no. 18725) for leave to commence this action without payment of the required filing fee. For the reasons stated below, the Court finds that plaintiff does not have sufficient funds to pay the entire filing fee, and therefore, will assess an initial partial filing fee of \$2.35. See 28 U.S.C. § 1915(b)(1). In addition, having carefully reviewed the file, the Court finds that the complaint is legally frivolous and will be dismissed as to defendant Cape Girardeau County Jail. The Court further finds that the complaint survives review under 28 U.S.C. § 1915(e)(2)(B) and should not be dismissed as this time as to defendant Unknown Gibbs. Therefore, the Court will order that said defendant reply to the complaint.

**28 U.S.C. § 1915(b) (1)**

Pursuant to 28 U.S.C. § 1915(b) (1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his prison account to pay the entire fee, the Court will assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account; or (2) the average monthly balance in the prisoner's account for the prior six-month period. See 28 U.S.C. § 1915(b) (1). After payment of the initial partial filing fee, the prisoner will be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. See 28 U.S.C. § 1915(b) (2). The agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. See 28 U.S.C. § 1915(a) (1), (2). A review of plaintiff's account statement indicates an average monthly deposit of \$11.75, and an average monthly account balance of \$.79. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess

an initial partial filing fee of \$2.35, which is 20 percent of plaintiff's average monthly deposit.

### **28 U.S.C. § 1915(e)**

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court may dismiss a complaint filed in forma pauperis at any time if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. An action is frivolous if "it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).

In reviewing a pro se complaint under § 1915(e)(2)(B), the Court must give the complaint the benefit of a liberal construction. Haines v. Kerner, 404 U.S. 519, 520 (1972). The Court must also weigh all factual allegations in favor of the plaintiff, unless the facts alleged are clearly baseless. Denton v. Hernandez, 504 U.S. 25, 32 (1992); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

### **The complaint**

Plaintiff, an inmate at the Cape Girardeau County Jail, seeks monetary relief in this action against defendants Cape Girardeau County Jail and Unknown Gibbs (nurse). Plaintiff claims

that defendant Gibbs denied him emergence medical treatment, in violation of his constitutional rights under 42 U.S.C. § 1983.

### **Discussion**

Plaintiff's claims against defendant Unknown Gibbs survive review under § 1915(e) (2) (B) and should not be dismissed at this time. See 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(g) (2). Therefore, the Court will order that defendant Gibbs reply to the complaint.

The complaint is legally frivolous as to defendant Cape Girardeau County Jail, because jails are not suable entities. See Lair v. Norris, 32 Fed. Appx. 175, 2002 WL 496779 (8th Cir. 2002); Alsbrook v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc) (§ 1983 suit cannot be brought against state agency), cert. dismissed, 529 U.S. 1001 (2000); Marsden v. Fed. Bureau of Prisons, 856 F. Supp. 832, 836 (S.D.N.Y. 1994) (jails are not entities amenable to suit). See Alabama v. Pugh, 438 U.S. 781, 782 (1978) (claim barred by Eleventh Amendment); Will v. Michigan Dept. of State Police, 491 U.S. 58, 63 (1989) (suit against Missouri Department of Corrections is, in effect, suit against State of Missouri; however, State of Missouri is not a "person" for purposes of § 1983).

In accordance with the foregoing,

**IT IS HEREBY ORDERED** that plaintiff's motion for leave to proceed in forma pauperis [Doc. #2] is **GRANTED**.

**IT IS FURTHER ORDERED** that plaintiff shall pay an initial partial filing fee of \$2.35 within thirty (30) days from the date of this order. Plaintiff is instructed to make his remittance payable to "Clerk, United States District Court," and to include upon it: (1) his name; (2) his prisoner registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

**IT IS FURTHER ORDERED** that if plaintiff fails to pay the initial partial filing fee within thirty (30) days, without good cause shown, the Court will dismiss this action without prejudice.

**IT IS FURTHER ORDERED** that, as to defendant Cape Girardeau County Jail, the Clerk shall not issue process or cause process to issue, because the complaint is legally frivolous and/or fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B).

**IT IS FURTHER ORDERED** that, as to defendant Unknown Gibbs, the Clerk shall issue process or cause process to issue upon the complaint.

**IT IS FURTHER ORDERED** that pursuant to 42 U.S.C. § 1997e(g)(2), defendant Unknown Gibbs shall reply to the complaint within the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

**IT IS FURTHER ORDERED** that, pursuant to this Court's differentiated case management system, this case is assigned to Track 5B (standard prisoner actions).

An appropriate order shall accompany this order and memorandum.

Dated this 18th day of December, 2007.

  
UNITED STATES DISTRICT JUDGE